83-414

No.

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-THREE

CHARLES D. GRIGGS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

H. JAY STEVENS
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ARCHIBALD J. THOMAS, III
Assistant Federal Public Defender

COUNSEL FOR PETITIONER

QUESTION PRESENTED FOR REVIEW

WHETHER PROSECUTION ON THE INSTANT INDICTMENT IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL AS SET FORTH IN ASHE v. SWENSON, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 496 (1970)?

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TABLE OF AUTHORITIES

Petitioner, Charles D. Griggs, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 27, 1983.

DECISION BELOW

The Court of Appeals entered its Order affirming in part and reversing in part the judgment of the District Court on May 3, 1983. Said Order became final on June 27, 1983, when the Petition for Rehearing was denied. A copy of Court's opinion and the Orders on Petitions for Rehearing, which are not to reported officially, are attached hereto.

JURISDICTION

The judgment of the Court below was entered on May 3, 1983, and became final on June 27, 1983, when Defendant's Petition for Rehearing was denied. The

Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

On May 31, 1979, a grand jury issued an indictment (first case) charging Mr. Griggs with three (3) counts of passing and uttering counterfeit money in violation of 18 U.S.C. §472. Count I of the indictment alleged that on April 20, 1979, Mr. Griggs, with the intent to defraud, passed and uttered to employees of Twelve North Restaurant, Jacksonville, Florida, five (5) forged and counterfeited federal reserve notes in fifty ($50.00)

dollar denominations. Count II of the indictment charged that on April 20, 1979, Mr. Griggs, with the intent to defraud, passed and uttered to an employee of Page One Lounge, Jacksonville, Florida, one (1) forged and counterfeited federal reserve note in the denomination of fifty ($50.00) dollars. Count III of the indictment charged that on April 20, 1979, Mr. Griggs, with the intent to defraud, passed and uttered to another employee of Page One Lounge, Jacksonville, Florida, one (1) forged and counterfeited federal reserve note in the denomination of fifty ($50.00) dollars.

After a week-long trial, June 25 through 29, 1979, the Defendant was acquitted by the Court on Count III and was found not guilty by the jury on the remaining two (2) counts.

Subsequent to the defendant's

acquittal on the first case, Mr. Griggs was again indicted on November 28, 1979, for counterfeit violations arising out of the same set of operative facts upon which the first indictment was based. Count I of the subsequent indictment (second case) charged Mr. Griggs with conspiracy to utter and to sell, exchange or transfer certain counterfeit fifty ($50.00) bills. Count II through V charged the Defendant with various substantive counterfeiting violations.

This second case was the subject of a pre-trial motion to dismiss virtually identical to the one filed herein. The denial of that motion to dismiss was the subject of an interlocutory appeal. United States v. Griggs, 651 F.2d 396 (5th Cir. 1981). In that appeal, the Court reversed the trial court's ruling with respect to its denial of the motion

to dismiss on Count V only. The Court of Appeals, after a thorough review of the record in the first case, held that the first jury necessarily determined that Mr. Griggs was unaware that the counterfeit currency in his possession on April 20, 1979, was in fact counterfeit. Id. at 400. The case was remanded back to the trial court with directions to dismiss Count V.

The instant indictment was filed approximately three (3) months after the second case and is again based on the same set of operative facts as were the first two cases. Specifically, the Defendant is charged with perjury in connection with the testimony he gave at his first trial concerning charges of which he was acquitted.

Count I of the instant indictment alleged that it was material to the trial to determine "whether Charles D. Griggs

ever knowingly possessed counterfeit bills during April, 1979." Count I further alleged that Mr. Griggs' testimony concerning this issue was false in that the Defendant "had possessed counterfeit bills, had provided counterfeit bills to Mr. Frederick Allen Kirschwing, and attempted to pass a torn counterfeit $50 bill at the Page One Lounge April 20, 1979." This Count was dismissed by the trial court as a result of the opinion in United States v. Griggs, 651 F.2d 396 (5th Cir. 1981).

Count II of the instant indictment alleged that it was material to the trial to determine "whether Charles D. Griggs had gone to see Mr. Frederick Allen Kirschwing at a cabin and fish camp on the St. Johns River after Griggs had been arrested on the charges in that case." Count II further alleged that Mr. Griggs'

testimony concerning this issue was false in that the Defendant "after his arrest on counterfeit charges, had gone to see Mr. Frederick Allen Kirschwing at a fish camp and cabin near the St. Johns River."

Count III alleged that it was a matter material to the trial to determine whether the Defendant had "within a few days after April 20, alerted other persons that Griggs and other person might be under investigation concerning counterfeit money and advised them what to do." Said Count further alleges that Mr. Griggs' testimony on this issue was false in that he "had advised Frederick Allen Kirschwing and Howard Jerome Kinsey, Jr. before April 26, 1979, that Griggs had heard authorities were looking for Griggs and perhaps them in connection with counterfeit money, and advised them

what to do."

The District Court herein dismissed Count IV for failure to state an offense.

Count V alleges that it was material to determine whether the Defendant, "prior to his arrest April 26, 1979, recalled the identity of the persons with whom he had spent the evening of April 20, 1979." Said Count further alleges that the Defendant's testimony on this matter was false in that he "knew prior to his arrest April 26, 1979, he had been with Frederick Allen Kirschwing and Howard Jerome Kinsey, Jr., the evening of April 20, 1979."

The Court below remanded the case to the District Court with directions to dismiss Count VI of the indictment because prosecution thereon was barred by the doctrine of collateral estoppel. In all other respects, the order of the

District Court was upheld. Thus, the Defendant is presently subject to prosecution on Counts II, III and V of the indictment.

REASONS FOR ALLOWANCE OF THE WRIT

That part of the decision below upholding the Defendant's prosecution on Counts II, III, and V of the indictment presents a clear conflict with the holding in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

The Court below held that, notwithstanding the Defendant's acquittal on all charges, since the jury was not necessarily required to believe the

Defendant's testimony regarding the collateral matters which are the subject of the present perjury case, the doctrine of callateral estoppel is inapplicable to Counts II, III and V.

The Defendant submits that the Court of Appeals erroneously applied the "hypertechnical archaic approach of a 19th Century pleading book" cautioned against in Ashe, supra. As stated therein, the inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceeding. The doctrine of collateral estoppel, as set forth in Ashe, supra, must be applied with "realism and rationality."

The gist of the defense was that Mr. Griggs while drinking heavily had become involved in a poker game at a bar in St. Augustine, Florida, with several individuals unknown to him at the time.

Mr. Griggs later went to dinner with one of the participants in the game, Frederick Allen "Butch" Kirschwing. The Defendant was unaware of the counterfeit nature of the bills passed that evening.

The evidence with respect to Mr. Kirschwing was overwhelming concerning his involvement in passing counterfeit currency.

At trial, the Government made Mr. Griggs' knowledge of and association with Mr. Kirschwing an extremely important and crucial fact. Equally important and crucial was whether Mr. Griggs had been involved in a poker game.

A review of the Defendant's testimony reveals that he stated that he didn't know Kirschwing very well and that he didn't even remember that he was with Kirschwing on the night in question until some time later, after his arrest. In

order to disprove this, the Government called Agent Pettway to testify. Agent Pettway testified that he asked Mr. Griggs on the day of his arrest whether he knew anything about Butch. Agent Pettway further testified that in response the Defendant said that he was not going to tell anything about the people he was with because he was not a snitch.

During closing argument, the Government seized on this testimony in arguing that the Defendant had guilty knowledge. As stated by the prosecutor, "If he didn't know that counterfeit bills were passed that night, there would have been nothing to snitch on at all."

The Government argued that the Defendant must be lying about his not remembering who he was with on April 20, 1979. With regard to this issue the Government argued to the jury that,

"Now, last and most important, I think, ladies and gentlemen, is the paucity of the defendant's story."

With respect to the issues of Mr. Griggs allegedly visiting Mr. Kirschwing at a fish camp and warning him and others that they were under investigation, the record reveals these issues were addressed by the Court during a proffer outside the jury's presence. However, the Court refused to allow the Defendant to be questioned about these issues before the jury.

The Government argued to the jury that:

> The issue is whether the evidence shows the defendant was guilty or whether you believe the defendant's story.
>
> Let's look at the credibility of that story. He got this money from either playing liar's poker or he got it from Butch.

The prosecutor further stated, "I submit it's incredible on its face, though, the story he told about liar's poker . . . " And in his final few words to the jury the prosecutor said:

> I submit to you that the defendant certainly has a story of convenience. I submit his story insults your intelligence, ladies and gentlemen. His story to you is just as counterfeit as these bills are.

Based upon the record of the first case, the United States Court of Appeals for the Fifth Circuit determined as a matter of fact that the jury that acquitted Mr. Griggs necessarily determined that he did not know that the money passed by him and others on April 20, 1979, was in fact counterfeit. United States v. Griggs, 651 F.2d 396 (5th Cir. 1981).

The Defendant submits that the jury herein was called upon to judge the Defendant's credibility concerning the

interwoven factual issues of Mr. Griggs knowing involvement of association with Frederick Allen Kirschwing during April, 1979.

The credibility of the Defendant's testimony was the theory upon which the case was tried. It is submitted that no rational jury could have acquitted the Defendant had they disbelieved his testimony regarding Mr. Kirschwing.

CONCLUSION

For the reasons set forth above, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

By: _____
ARCHIBALD J. THOMAS, III
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Post Office Box 4998
Jacksonville, Florida 32201
Telephone (904) 791-3039

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing have been furnished to the Solicitor General, Room 5143, Main Justice Bldg., 10th & Constitution Avenue, N.W., Washington, D. C. 20530, by mail, this 8th day of September, 1983.

_____
Assistant Federal Public Defender

APPENDIX

A - Decision of the Court of Appeals, May 3, 1983.

B - Order on Petition for Rehearing, June 27, 1983.

Exhibit A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6182

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appetlant,

v.

CHARLES GRIGGS,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(May 3, 1983)

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

PER CURIAM:

This is an appeal and cross-appeal from the judgment of the district court granting in part and denying in part defendant's motion to dismiss an indictment charging six counts of violation of 18 U.S.C. § 1613, false declarations before a jury or court. The district court dismissed Count IV for failure to state an offense. The court granted the defendant's motion to dismiss on the grounds of collateral estoppel as to Count I, which decision the government appeals, but denied the motion to dismiss the remaining four counts, which defendant appeals.

The facts of this case are explored in depth in United States v. Griggs, 651 F.2d 396 (5th Cir. Unit B 1981), and in the opinion of the district court. Because we agree with the reasoning of the district court as to all counts except

Count VI, we adopt its opinion, with the aforesaid exception, as our own. As to Count VI, we write separately.

In denying the motion to dismiss Counts II, III, V, and VI the district court stated: " . . . all of the remaining counts of the instant indictment deal with actions and events occurring at times other than the evening of April 20, 1979, which is the date upon which defendant was alleged to have passed the counterfeit bills." Count VI charges that "[i]t was a matter material to said trial to determine whether Charles D. Griggs and Frederick Allen Kirschwing had been playing "liar's poker" together at the White Lion Bar on the afternoon of April 20, 1979." Count VI further charges that Griggs' testimony to this effect was perjured. Although the events charged in Count VI occurred the afternoon, and

not evening, of April 20, as a factual matter they were pertinent to, and encompassed within, matters adjudicated previously concerning the evening of April 20.

As the district court recognized, Griggs' motion to dismiss Count VI should be denied only if "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The factual issue presented is whether the jury that initially acquitted Griggs could have based the acquittal on some grounds other than the transfer of money during the "liar's poker" game. The government asserts a rational jury could so conclude, arguing Griggs stated he was only a conduit for the passed counterfeit bills; by this reasoning, Griggs need not have acquired any bills of his own in the poker game.

In United States v. Griggs, 651 F. 2d 396 (5th Cir. Unit B 1981) we stated:

> Griggs testified on his own behalf. The defense proceeded on the theory that Griggs was unaware of the fact that the bills were counterfeit. In support of this theory, Griggs testified that he acquired the fifty dollar bills at the White Lion's Tavern in Saint Augustine, Florida, where he participated in a "liar's poker game" with Kirschwing. He further testified that after drinking a considerable amount of alcoholic beverages and playing "liar's poker," he and Kirschwing decided to travel to Jacksonville to have dinner. Although he did not recall paying for the drinks that the three men had at the bar, he remembered that Kirschwing supplied the fifty dollar bills which he gave to the waiter to pay the check. He admitted that he supplied the fifty dollar bill which was passed to the waiter in order to obtain change.

Id. at 399.

As the above quotation makes clear, Griggs testified that in at least one instance, providing the fifty dollar bill

for change, he was not a conduit, but provided the bill himself. We also concluded Griggs "had no knowledge that the counterfeit bills which he passed at Twelve North Restaurant were counterfeit," id. (emphasis supplied). On the facts of the case, therefore, the jury must have concluded Griggs won the fifty dollar bill in the poker game earlier that day. This issue having previously been litigated we reverse the court below as to Count VI and remand with directions to dismiss that count.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

Exhibit B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6182

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Plaintiff-Cross Appellant,

versus

CHARLES GRIGGS,

Defendant-Appellant,
Defendant-Cross Appellee.

- - - - - - - - - - -

Appeal from the United States District Court for the Middle District of Florida

- - - - - - - - - - -

ON PETITION FOR REHEARING

(JUNE 27, 1983)

Before KRAVITCH, HENDERSON and ANDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is

hereby *denied*.

ENTERED FOR THE COURT:

/s/ *Phyllis Kravitch*
United States Circuit Judge

REHG-4

No. 83-414
IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINETEEN HUNDRED AND EIGHTY-THREE

CHARLES D. GRIGGS,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. Case No. 80-13-Cr-J-B

CHARLES D. GRIGGS

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE

This cause is before the Court on defendant's Motion to Dismiss with Prejudice, filed herein on June 25, 1980. The instant case was stayed pending resolution of an interlocutory appeal in a related case, United States v. Griggs, Case No. 79-13-Cr-J-M, by order of the Court dated October 17, 1980. Due to the protracted and intertwined history of this and two related cases, the Court will begin its opinion with a chronological statement of the facts.

INTRODUCTION

Defendant herein has been charged with violation of 18 U.S.C. § 1623, false declarations before a jury or court. The alleged perjury occurred during the trial of United States v. Griggs, Case No. 79-49-Cr-J-M (hereinafter "the first case"). The first case involved an alleged violation of 18 U.S.C. § 472, uttering counterfeit obligations or securities. Defendant was acquitted on all three counts of that indictment. Subsequently, defendant was indicted for alleged violation of 18 U.S.C. §§ 371, 472, & 473 (conspiracy to commit offense, uttering counterfeit obligations or securities, and dealing in counterfeit obligations or securities, respectively), in United States v. Griggs, Case No. 79-138-Cr-J-M (hereinafter "the second case"). Defendant filed a Motion to Dismiss the

indictment in the second case on the basis of collateral estoppel, arguing that certain issues presented therein had been previously determined by his acquittal in the first case. Defendant's Motion to Dismiss was denied, whereupon he appealed to the Fifth Circuit Court of Appeals. In the meantime, a third (perjury) indictment was returned, and defendant filed the instant Motion to Dismiss, which is also based upon collateral estoppel. Because certain issues presented in this motion are identical to issues presented in the previous motion, disposition of the instant case was stayed, at the request of defendant, pending resolution of the appeal. See Defendant's Response to Government's Supplement to Memorandum in Opposition to Defendant's Motion to

Suppress [sic] at 2 (filed August 29, 1980).[1] As noted previously, the mandate in the second case has now been returned, and the Court is now able to proceed with the resolution of this matter.

THE FIRST CASE

The indictment in the first case charged defendant with three counts of passing and uttering counterfeit money in violation of 18 U.S.C. § 472. Count I alleged that on April 20, 1979, defendant, with intent to defraud, passed and uttered to employees of Twelve North Restaurant, Jacksonville, Florida, five forged and counterfeited federal reserve notes in fifty dollar ($50) denominations.

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[1] This case was continued previously, also upon defendant's request, for similar reasons. See defendant's Motion for Continuance (filed July 2, 1980).

Count II alleged that on April 20, 1979, defendant, with intent to defraud, passed and uttered to an employee of Page One Lounge, Jacksonville, Florida, one forged and counterfeited federal reserve note in the denomination of fifty dollars ($50). Count III alleged that on April 20, 1979, defendant, with intent to defraud, passed and uttered to another employee of Page One Lounge, Jacksonville, Florida, one forged and counterfeited federal reserve note in the denomination of fifty dollars ($50). Defendant entered a not guilty plea to each of the three counts and a jury trial ensued. At the close of the evidence, the court granted defendant's motion for directed verdict as to Count III. The jury returned a verdict of not guilty as to the remaining two counts.

THE SECOND CASE

The indictment returned in the second case charged defendant in five separate counts. Count I charged defendant with conspiracy to publish, pass, sell, and deliver counterfeit fifty dollar ($50) federal reserve notes, alleging 13 overt acts performed by defendant between April 1, 1979, and August 17, 1979, in furtherance of the conspiracy. Counts II and III alleged that on April 6 and 17, 1979, defendant sold, transferred, and delivered to one Federick Kirschwing 20 counterfeit fifty dollar ($50) federal reserve notes. Count IV alleged that on April 6, 1979, defendant possessed an unknown quantity of counterfeit federal reserve notes in twenty (20), fifty (50), and one hundred (100) dollar denominations. Count V alleged that on April 20, 1979,

defendant attempted to pass and utter to one Barbara Rhodes at the Page One Lounge in Jacksonville, Florida, one counterfeit fifty dollar ($50) federal reserve note, knowing it to be counterfeit, and with intent to defraud.

Defendant moved the court in the second case to dismiss the indictment on the ground that the government was collaterally estopped from relitigating the essential facts of that case, arguing that those facts had been previously determined in his favor by virtue of his acquittal of counterfeiting charges in the first case. The court denied defendant's motion in toto, whereupon defendant filed his appeal.

THE APPEAL

The appellate court agreed with the trial court's determination that the

crimes alleged in Counts I through IV of the indictment in the second case were not barred by application of the doctrine of collateral estoppel. United States v. Griggs, 651 F.2d 396, 399-400 (5th Cir. 1981). The court noted that those four counts alleged crimes which were distinctly different in nature from the passing and uttering charges of which defendant was acquitted, in that they were alleged to have occurred on different dates and at different times than those charged in the previous indictment. Id. at 399. However, the appellate court disagreed with the trial court's determination that the crime alleged in Count V of the indictment in the second case was not barred by application of the doctrine of collateral estoppel. Id. at 400. As noted previously, Count V charged a completed pass to Barbara Rhodes, an employee of

Page One Lounge, on the evening of April 20, 1981. The appellate court held that prosecution of Count V of the second case was barred by the jury's acquittal of defendant as to Count I of the first case. The appellate court found that defendant's acquittal on Count I of the first indictment, which charged that on April 20, 1979, defendant, with intent to defraud, passed and uttered to employees of Twelve North Restaurant five forged and counterfeited federal reserve notes in fifty dollar ($50) denominations, established that defendant had no knowledge that the counterfeit bills which he pased at Twelve North Restaurant were counterfeit. Id. at 399.

The appellate court reasoned that although the incidents alleged in Count I of the first indictment and Count V of the second indictment constituted

separate transactions involving different crimes and different bills, occurring at different times and places, "the events which transpired on the evening of April 20 [were] so intimately related that if the defendant lacked knowledge that the bills were counterfeit in the Twelve North Restaurant, he also lacked knowledge that a fifty dollar bill in his possession which he attempted to pass in the Page One Lounge was counterfeit." Id. at 400. Thus, prosecution of Count V of the second indictment was barred by defendant's acquittal as to Count I of the first indictment.

THE INSTANT CASE

The instant indictment charges defendant in six counts with violation of 18 U.S.C. § 1623, false declarations before a jury or court. Count IV of the

indictment was dismissed by order of the Court dated June 19, 1980. Count I charges that on June 27, 1979, defendant falsely testified that he did not provide counterfeit bills to one Frederick Kirschwing and that he did not attempt to pass a torn counterfeit fifty dollar ($50) bill at the Page One Lounge on April 20, 1979. Count II charges that on June 27, 1975 [sic], defendant falsely testified that after his arrest on counterfeit charges, he did not go to see Frederick Kirschwing at a fish camp and cabin near the St. Johns River. Count III charges that on June 27, 1979, defendant falsely testified that he did not advise Frederick Kirschwing and Howard Kinsey before April 26, 1979, that he had heard that authorities were looking for him and perhaps them in connection with counterfeit money and that he did not advise them what to do. Count V

alleges that on June 27, 1979, defendant falsely testified that he did not know, prior to his arrest on April 26, 1979, that he had been with Frederick Kirschwing and Howard Kinsey on the evening of April 20, 1979. Count VI charges that on June 27, 1979, defendant falsely testified that he was involved in a game of "liars' poker" on the afternoon and evening of April 20, 1979. Defendant now seeks dismissal of all counts of the indictment on the grounds of collateral estoppel.

THE COLLATERAL ESTOPPEL ARGUMENT AS APPLIED TO THE INSTANT CASE

A. Count I

In light of the fifth circuit's determination of the appeal in the second case, it would appear that this Court is required to hold that prosecution of Count I in the instant case is barred by the

doctrine of collateral estoppel. Indeed, Count I presents an issue which is nearly identical to that discussed in the appellate opinion. Count I charges that defendant perjured himself when he testified that he did not know that the bills which he passed at the Page One Lounge on April 20, 1979, were counterfeit. However, the fifth circuit has determined that because the jury determined that defendant lacked knowledge of the counterfeit nature of the bills which he passed at Twelve North Restaurant on the same evening, and because the events which transpired on the evening of April 20, 1979, were so "intimately related," if defendant lacked knowlege that the bills were counterfeit in the Twelve North Restaurant, he also lacked knowledge that the fifty dollar ($50) bill which he attempted to pass in the Page One

Lounge was counterfeit. Obviously, if defendant cannot now be prosecuted for violation of 18 U.S.C. § 472 in connection with the incident at Page One Lounge based upon a jury determination that he lacked knowldege of the counterfeit nature of the bills, he cannot now be prosecuted for perjury in connection with his testimony that he lacked knowledge of the counterfeit nature of the bills. Therefore, prosecution of defendant under Count I of the instant indictment is barred by application of the doctrine of collateral estoppel. Accordingly, Count I will be dismissed.

B. Counts II, III, V, VI

Defendant argues that the remaining counts of the instant indictment should be dismissed based upon his acquittal in the first case. Defendant argues that

"[t]he underlying issue . . . during the trial, whether the jury believed the testimony of defendant," and that the government is now precluded from challenging the truthfulness of defendant's testimony. However, the jury's acquittal of defendant cannot be taken as an indication that they believed his testimony in toto. As noted by Judge Melton in his Opinion on the first Motion to Dismiss, a review of the record reveals that defendant's defense was multifaceted, including lack of knowledge, intoxication, and mistaken identity. Thus, the jury's verdict could have been based upon a belief in the truthfulness of some, but not all, of defendant's testimony.

Ashe v. Swenson, 397 U.S. 436 (1970), the landmark case on the doctrine of collateral estoppel, held that when an

issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. As a corollary to that holding, the court stated that where a previous judgment of acquittal was based upon a general verdict, the federal rule of collateral estoppel requires the court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and to conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. In accordance with the dictates of Ashe, this Court has carefully examined the record of the first case, paying particular attention to defendant's testimony. It is readily apparent that the jury's

verdict could have been based upon belief in the credibility of any one of a number of the exculpatory segments of his testimony.

The Court particularly notes the fact that all of the remaining counts of the instant indictment deal with actions and events occurring at times other than the evening of April 20, 1979, which is the date upon which defendant was alleged to have passed the counterfeit bills. Defendant is now charged with commission of an entirely different offense with respect to these actions and events. Although relevant to the previous charges of uttering counterfeit obligations or securities, the instant charges of perjury are by no means identical offenses. Therefore, they cannot be held to be barred by application of the doctrine of collateral estoppel. Accordingly, it is

ORDERED AND ADJUDGED:

1. That defendant's Motion to Dismiss with Prejudice, filed herein on June 25, 1980, is granted as to Count I of the indictment, but is denied as to Counts II, III, V, and VI.

2. That Count I of the indictment is hereby dismissed with prejudice.

DONE AND ORDERED at Jacksonville, Florida, this 13 day of November, 1981.

/s/ Susan H. Black
UNITED STATES DISTRICT JUDGE

Copies:
Counsel of Record

Respectfully submitted,

H. JAY STEVENS
Federal Public Defender

By: _____
ARCHIBALD J. THOMAS, III
Assistant Federal Public Defender
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Jacksonville, Florida 32201
Telephone (904) 791-3039

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) copies of the foregoing has been furnised to the Solicitor General, Room 5143, Main Justice Bldg., 10th & Constitution Avenue, N.W., Washington, D. C. 20530, by mail, this 21st day of ~~September~~ October, 1983.

_____
Assistant Federal Public Defender

No. 83-414

In the Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES D. GRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

SARA CRISCITELLI
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Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the courts below correctly found that petitioner's prior acquittal of passing counterfeit bills did not "necessarily adjudicate" the truthfulness of his testimony and therefore would not bar his prosecution for perjury committed at the prior trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-414

CHARLES D. GRIGGS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-6) is not reported. The order of the district court granting in part and denying in part petitioner's motion to dismiss (Pet. Supp. App. 1-18) also is not reported. A prior opinion of the court of appeals in a related case is reported at 651 F.2d 396.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1983. A petition for rehearing was denied on June 27, 1983 (Pet. App. B 1-2). The petition for a writ of certiorari was filed as of August 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 22, 1980, a grand jury sitting in the Middle District of Florida indicted petitioner on six counts of perjury, in violation of 18 U.S.C. 1623. One count was

dismissed for failure to state an offense, and petitioner moved to dismiss the remaining counts on double jeopardy grounds. The district court granted petitioner's motion as to one of the counts, but denied it as to the remaining four counts (Pet. Supp. App. 1-18). On appeal by petitioner and cross-appeal by the government, the court of appeals affirmed the decision of the district court as to all but one count, which it ordered dismissed (Pet. App. A 1-6).

1. The history of this case is set forth in the opinion of the district court (Pet. Supp. App. 2-12) and in a prior opinion of the court of appeals (*United States* v. *Griggs*, 651 F.2d 396 (5th Cir. 1981)). Petitioner originally was tried on three counts of uttering counterfeit bills, in violation of 18 U.S.C. 472. Count one charged that on April 20, 1979, petitioner passed five counterfeit $50 bills to employees of the Twelve North Restaurant in Jacksonville, Florida. Count two charged petitioner with passing one counterfeit $50 bill to Susan Monson, an employee of the Page One Lounge in Jacksonville, on the same date. Count three alleged that petitioner passed another counterfeit $50 bill to Barbara Rhodes, another employee of the Page One Lounge, also on April 20, 1979. 651 F.2d 397; Pet. Supp. App. 4-5.

The evidence presented at the first trial showed that on April 20, 1979, petitioner, Frederick Kirschwing and Howard Kinsey dined and drank together at the Twelve North Restaurant and the Page One Lounge in Jacksonville. The charges were paid for with counterfeit $50 bills. Witnesses testified that petitioner made the payments alleged in the first two counts, but Rhodes was unable to identify which of the three men made the payment charged in the third count.

Petitioner testified that he had won the $50 bills from Kirschwing in a "liars' poker" game earlier in the day and that he was unaware they were counterfeit. Petitioner also testified that he did not recall paying for the drinks that the

three men had consumed at the bar of the Twelve North Restaurant, but that Kirschwing had supplied the bills that petitioner had used to pay for dinner at the restaurant (count one). He denied paying the cover charge or bar bill for the three men at the Page One Lounge (counts two and three), but admitted asking the bartender there to change a $50 bill that subsequently was determined to be counterfeit. 651 F.2d 397-398. Kirschwing could not be located to testify at the first trial.

At the close of the evidence, the district court granted petitioner's motion for a directed verdict on count three. The jury subsequently acquitted petitioner on counts one and two.

2. Thereafter, Kirschwing surrendered and began to cooperate with the government. In the course of that cooperation Kirschwing recorded a conversation with petitioner, during which petitioner admitted both his connection with the counterfeit money and that he had warned Kirschwing that the authorities would be looking for him and had encouraged him to hide (R. III-57 at 3 and App. A to that pleading).[1]

As a result of Kirschwing's cooperation, petitioner was charged in a second, five-count indictment with conspiracy, uttering counterfeit bills and dealing in counterfeit bills, in violation of 18 U.S.C. 371, 472 and 473. Petitioner filed a motion to dismiss the second indictment on the ground of collateral estoppel, arguing that the prior acquittal resolved the second series of charges. The district court denied petitioner's motion in its entirety, and the court of appeals

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[1] References to the record on appeal are taken from the government's brief in the court of appeals.

affirmed as to counts one through four.[2] The court of appeals agreed with petitioner, however, that collateral estoppel barred count five, which charged petitioner with attempting to pass counterfeit money to the bartender of the Page One Lounge based on his request for change for a counterfeit $50 bill. 651 F.2d 400-401.[3]

3. Prior to the court of appeals' decision on petitioner's interlocutory appeal in the second case, the indictment in this case was returned, charging petitioner with committing perjury at his first trial. Count one of the perjury indictment charged that petitioner falsely testified that he did not provide counterfeit bills to Kirschwing and that he did not attempt to pass a counterfeit $50 bill at the Page One Lounge on April 20, 1979. Count two charged that petitioner falsely testified that, following his arrest on counterfeiting charges, he did not go to see Kirschwing at a fishing camp. Count three charged that petitioner falsely testified that he did not advise Kirschwing and Kinsey, prior to April 26, 1979, that he had heard the authorities were looking for him and perhaps them in connection with counterfeit money and that he did not advise them what to do. Count five charged that petitioner falsely testified that until April 26, 1979, he had not remembered the identity of the individuals with whom he spent the evening of April 20, 1979.

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[2]Count one alleged that between April 1, 1979, and August 17, 1979, petitioner and others conspired to publish, pass, sell and deliver counterfeit $50 bills. Counts two through four charged petitioner with committing various substantive counterfeiting offenses on dates prior to April 20, 1979. 651 F.2d 398.

[3]Petitioner was convicted on the conspiracy count. His appeal from that conviction is currently pending before the Eleventh Circuit, No. 82-5319.

Count six charged that petitioner falsely testified that he had participated in a game of "liars' poker" during the afternoon and evening of April 20, 1979.[4]

Subsequent to the court of appeals' remand of the second case, the district court in this case granted petitioner's motion to dismiss count one on collateral estoppel grounds, but denied the motion as to the remaining four counts (Pet. Supp. App. 1-18). Both the government and petitioner appealed the district court's order. The court of appeals affirmed the disrict court's dismissal of count one as well as its refusal to dismiss counts two, three and five, but reversed its refusal to dismiss count six (Pet. App. A 1-6). Petitioner accordingly is presently awaiting trial on the remaining three perjury counts.

ARGUMENT

Petitioner contends (Pet. 9-15) that prosecution on the remaining perjury counts is barred because his prior acquittal of passing counterfeit money represents a favorable assessment of his credibility. Both courts below correctly rejected this fact-bound claim.[5]

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[4]Count four, which charged that petitioner falsely testified he did not know why Kinsey and Kirschwing had left the Page One Lounge before he did on the evenlng of April 20, 1979, was dismissed for failure to state an offense.

[5]Although the court of appeals assumed jurisdiction over petitioner's interlocutory appeal in reliance upon *Abney* v. *United States*, 431 U.S. 651 (1977), we note our disagreement with that action. While petitioner's collateral estoppel claim is grounded in the Double Jeopardy Clause, this case does not involve a second trial for the same offense, and any injury petitioner would have suffered from an invalid conviction could be fully remedied by reversal on appeal following a final judgment.

As this Court explained in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), the phrase "collateral estoppel" stands for the principle "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." In order to determine whether collateral estoppel applies, a court must " 'examine the record * * * evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Id.* at 444, quoting Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv. L. Rev. 1, 38-39 (1960). Applying this standard, both courts below concluded that the prior acquittal of petitioner indicated only that the jury believed his account of the events of April 20, 1979, not that it accepted the entirety of his testimony, including his version of his association with Kirschwing (Pet. Supp. App. 15-17; Pet. App. A 2-3; see also 651 F.2d 399-400). Further review of this fact-bound determination is not warranted.

Petitioner's contention (Pet. 14-15) that "the jury * * * was called upon to judge [his] credibility concerning the interwoven factual issues of [his] knowing involvement [or] association with Frederick Allen Kirschwing during April, 1979" is in fact unfounded. Petitioner cites no record or legal authority for this assertion and we are aware of none. To the contrary, courts are careful to restrict the application of collateral estoppel to those issues that have been "*necessarily adjudicated* in the former trial." *Sealfon* v. *United States*, 332 U.S. 575, 580 (1948) (emphasis added). See also *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), cert. denied, 419 U.S. 1079 (1974); *United States* v. *Haines*, 485 F.2d 564, 565 (7th Cir. 1973), cert. denied, 417 U.S. 977 (1974); *Adams* v. *United States*, 287 F.2d 701, 704 (5th Cir. 1961).

The only charges made against petitioner in the first case related to the alleged passing of counterfeit $50 bills in two Jacksonville restaurants on April 20, 1979. Petitioner's acquittal on those charges thus represented, at most, a determination of the truthfulness of his testimony that he either did not pass counterfeit bills on the evening of April 20, 1979, or, if he did, he did not know they were counterfeit. Under settled collateral estoppel principles, petitioner could not thereafter be prosecuted for offenses requiring proof of such actions or knowledge; on that basis, the courts below dismissed counts one and six of the perjury indictment. However, the remaining perjury counts relate to petitioner's testimony on cross-examination concerning matters collateral to these "ultimate facts"—*viz.*, whether petitioner visited Kirschwing at the fishing camp subsequent to petitioner's arrest on the counterfeiting charges (count two), whether petitioner warned Kirschwing and Kinsey that the authorities were looking for him and perhaps them in connection with counterfeit money (count three), and whether petitioner remembered, prior to April 26, 1979, that Kinsey and Kirschwing were his companions on April 20, 1979 (count five). Because the factfinder did not have to believe petitioner's testimony with respect to these collateral matters in order to have acquitted him on the offenses charged in the first indictment, prosecution on counts two, three and five of the perjury indictment is not barred by collateral estoppel. See *United States* v. *Williams*, 341 U.S. 58, 63-65 (1951); *United States* v. *Dipp*, 581 F.2d 1323, 1326 (9th Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *United States* v. *Tramunti*, 500 F.2d at 1347; *United States* v. *Haines*, 485 F.2d at 565-566; *Adams* v. *United States*, 287 F.2d at 704-705.

In any event, even if the prior acquittal did represent a determination by the first jury that petitioner had testified truthfully with respect to all aspects of his association with

Kirschwing, such a finding would not bar a subsequent perjury prosecution based on evidence that was not available at the first trial. See *United States* v. *Sarno*, 596 F.2d 404, 407 (9th Cir. 1979); *United States* v. *Nash*, 447 F.2d 1382, 1387 (4th Cir. 1971) (Winter, J., concurring). Cf. *Standefer* v. *United States*, 447 U.S. 10, 22-25 (1980). Here, evidence of the charged perjury was not discoverable by the government prior to the first trial precisely because petitioner had made Kirschwing unavailable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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